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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 82-5988

MICHAEL RIZZITELLO,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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continued in 9th Cir.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Michael Rizzitello, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on September 3, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit appears in Appendix "A" hereto. The order denying the Petition for Rehearing and rejecting the Suggestion for Rehearing En Banc appears in Appendix "B". No opinion was rendered by the trial judge, however, a published opinion rejecting the motion to dismiss was filed in United States v. Brooklier, 459 F. Supp. 476 (C.D. Cal. 1978), which concerned the same factual situation in an earlier indictment which was ultimately dismissed on other grounds.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit affirmed petitioner's conviction was entered on September 3, 1982. The order denying the Petition for Rehearing and rejecting the suggestion for Rehearing En Banc was entered November 1, 1982. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does a violation of the Hobbs Act occur where there exists no actual or potential effect on interstate commerce?

2. Can a "manufactured" jurisdiction suffice to confer federal jurisdiction under the Hobbs Act?

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REASONS FOR GRANTING WRIT

This case presents the important question whether Congress intended that the Hobbs Act be used to prosecute cases where no actual or potential effect on interstate commerce could be shown. The prosecution, in an attempt to provide the necessary interstate commerce nexus, has "manufactured" the supposed connection with commerce by inducing one of the alleged co-conspirators to cross a state line to receive a supposed "extortion" payment.

The case presents important questions concerning the extent and reach of federal power in prosecution offenses which have no effect on interstate commerce; it presents equally important questions concerning the extent to which law enforcement can be permitted to go in "creating" a federal offense where none would otherwise exist.

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STATUTES INVOLVED

18 U.S.C. 1962(c) & (d):

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate commerce or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. 1951:

(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by robbery or extortion or attempts or conspires so to do or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

On February 20, 1979, a federal grand jury in Los Angeles returned a five count indictment against petitioner Rizzitello and co-defendants Dominick Brooklier, Samuel Sciortino, Louis Dragna, and Jack Locicero.

Count One alleged that each of the defendants was employed by and were members of an "enterprise", known as the Los Angeles "family" of the La Cosa Nostra. It was further alleged that the defendants conspired together to commit acts of racketeering through the "enterprise" in violation of 18 U.S.C. 1962(d).

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Count Two alleged that each of the defendants, acting through the charged "enterprise", committed seven specific acts of racketeering as defined in 18 U.S.C. 1961.

Count Four alleged that Rizzitello and co-defendant Locicero conspired to extort $7500 from Forex Company, which was in actuality an undercover operation of the F.B.I. which purported to deal in pornographic films. Count Four specifically alleged that the defendants attempted and conspired "to obstruct, delay and affect commerce" in violation of 18 U.S.C. 1951(a).

Following unsuccessful motions to dismiss the indictment[1/] defendant was convicted by a jury of Counts I, II, and IV. He was acquitted of a fourth count, which alleged an attempted extortion of pornographer Theodore Gaswirth.

Following preparation of a presentence report, petitioner was sentenced to the custody of the Attorney General for a period of five (5) years pursuant to 18 U.S.C. 4205(b)(2) on each of the three counts, the sentences to run concurrently.

Petitioner has been at liberty since his indictment on bond in the amount of $50,000.

1/ Counsel for defendants moved pretrial to dismiss Count Four of the indictment on the grounds that it failed to show federal jurisdiction in that there could have been no effect on interstate commerce, as required by 18 U.S.C. 1951, as the Forex Company was not actually in business, but was merely an undercover operation of the F.B.I. The trial judge relying on Judge Pregerson's opinion in U.S. v. Brooklier, 459 F. Supp. 476 (1978), which concerned the same factual situation in a previously dismissed indictment, found that no effect need be shown where a conspiracy to violate 18 U.S.C. 1951 is alleged.

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STATEMENT OF FACTS

The bulk of the evidence concerning petitioner involved his participation in the attempted extortion of the Forex Company. Forex, which was an undercover operation of the F.B.I. purporting to deal in pornographic films, was never actually in business, and had only props as inventory. It was not disputed that Rizzitello and co-defendant Locicero sought and obtained $7,500 from the "owners" of the Forex Company, who were in actuality Special Agents of the F.B.I. The thrust of defendants' motions to dismiss and judgment of acquittal was since Forex was never in business, the attempted extortion could have no actual or potential effect on interstate commerce.

One payment, in the amount of $1,000, was made to unindicted co-defendant Thomas Ricciardi in Las Vegas, Nevada, by the undercover agents of the F.B.I. They advised Ricciardi that they had to be in Las Vegas on business, and it would be necessary for him to come to Nevada to receive his weekly payment. The meeting in a Las Vegas Hotel suite was recorded and the payment was claimed to show a sufficient interstate nexus for a violation of the Hobbs Act.

The case raises the question of whether a violation of the Hobbs Act can occur where the object of the attempted extortion is not actually in business, and therefore cannot conceivably have an actual or potential effect on interstate commerce. The case also raises the question whether such affect on interstate commerce is necessary where an attempt or conspiracy to extort is alleged, as opposed to an actual extortion. In the instant indictment, the government alleged both an attempt and a conspiracy, eventually electing to proceed on the theory of conspiracy. In United States v. Brooklier, supra, the original trial judge ruled that no effect on commerce need be

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shown where an attempt is alleged; this ruling was reaffirmed by the new trial judge when the government eventually elected to proceed on the theory that the defendants conspired to extort monies from Forex.

QUESTIONS PRESENTED

1. DOES FEDERAL JURISDICTION UNDER THE HOBBS ACT [18 USC 1951] EXIST WHERE NO ACTUAL OR POTENTIAL EFFECT ON INTERSTATE COMMERCE CAN BE SHOWN?

On three separate occasions, counsel for defendants moved to dismiss the Hobbs Act charge (Count IV) and strike the corresponding acts of racketeering alleged in Counts I and II of the indictment.

The motion alleged that Count IV must be dismissed because the attempt (or conspiracy) to extort money from Forex, the undercover FBI operation could not have any actual or potential effect on interstate commerce, as required by 18 U.S.C. 1951.

At the time of the original filing of the motion, Judge Harry Pregerson heard and denied the request for dismissal, finding that an attempt to violate the Hobbs Act did not require any effect on interstate commerce. That ruling was published at 459 F. Supp. 476 (C.D. Cal. 1978).

The motion was thereafter renewed and denied when two subsequent indictments were returned, and when the government eventually determined to allege a conspiracy to extort, the new trial Judge, Terry Hatter reaffirmed the original ruling by Judge Pregerson.

In his original decision, Judge Pregerson concluded that where an inchoate crime of attempt (and arguable conspiracy) was alleged, no actual or potential effect on commerce need be shown. While conceding no specific case law supported that conclusion, Judge Pregerson concluded that a reading of United

States v. Staszcuk, 517 F. 2d 53 (7th Cir. 1975) was persuasive authority for his position. 2/ It is submitted that the better view is that an effect on interstate commerce is a jurisdictional necessity, whether a choate or inchoate crime is charged under the Hobbs Act. A review of statutory and constitutional authority supports the position advanced by petitioner herein.

A. Constitutional Basis of the Hobbs Act (18 U.S.C. 1951)

The present form of Title 18 United States Code 1951, commonly known as the Hobbs Act, reflects a codification of a 1934 enactment called the "Federal Anti-Racketering Act of 1934". The subsequent amendments in 1946 were intended to encompass the conduct held beyond the reach of the 1934 Act by the Supreme Court in United States v. Local 807, 315 U.S. 521 (1942).

This broadening amendment concerned primarily the proper differentiation between "legitimate" labor activity and labor "racketeering".

The present Hobbs Act authority is bottomed on the Commerce Clause contained in Article 1, Section 8, of the United States Constitution. The primary purpose of the commerce clause was to secure freedom of trade, to break down the barriers to its free flow, and to curtail the rising volume of restraints upon commerce that the Articles of Confederation were inadequate to control

The language of the statute, cited supra., its legislative history and previous judicial interpretations all confirm an intent by Congress to exercise its power under the commerce

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2/ Subsequent to United States v. Brooklier, supra, and the opinion at 476 F. Supp. 476, the Ninth Circuit adopted Judge Pregerson reasoning in United States v. Bagnariol, 665 F.2d 877, 895-96 (9th Cir. 1981).

clause. The definition of the word "commerce" in the 1934 Act encompassed "all other trade or commerce over which the United States has constitutional jurisdiction". The Senate Report approvingly quoted a Department of Justice memorandum that the proposed statute was designed "to extend federal jurisdiction over all restraints of any commerce within the scope of the federal government's constitutional power". See Senate Report, No. 532, 73rd Cong. 2nd Sess. at 1 (1934).

As the Supreme Court stated in Stirone v. United States, 361 U.S. 212, the broad language of the Hobbs Act manifests "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence". Id. at 215.

Clearly, the Hobbs Act draws its full and complete vitality from the commerce clause and was intended to apply to those proscribed activities which adversely affect commerce.

b. Application of the Hobbs Act

Consistent with the language of the statute and the expressed legislative intent to cope with the problems of labor racketeering, courts have consistently held the Act should apply to a wide range of extortionate activity. In each case, a nexus has been required between the extortionate conduct and interstate commerce in order to confer federal jurisdiction.

That nexus may be de minimis, United States v. DeMet, 486 F.2d 816, 822 (7th Cir. 1973), but it must nonetheless exist. Its connection with or effect on interstate commerce must at least present a "realistic possibility at the time of the extortionate act". United States v. Statszuk, supra, at 59-60.

Jurisdiction is satisfied where an extortionate payment was demanded after the event which had any possible effect on interstate commerce. United States v. Kuta, 518 F.2d 947 (7th Cir. 1975)

Courts have found potential future effect on interstate commerce sufficient to invoke the statute. United States v. DiGregorio, 605 F.2d 1184 (1st Cir. 1979), or a showing that funds were diverted which might have otherwise been employed in interstate commerce. United States v. Santoni, 585 F.2d 667 (4th Cir. 1978).

However, where no actual or potential effect on interstate commerce can be shown, a prosecution under the Act will fail. United States v. Elders, 569 F2d 1020 (7th Cir. 1978.

C. Inchoate Offenses under the Hobbs Act

The Act prohibits not only the acts of obstructing or attempting to obstruct commerce through extortion, but also conspiracies to do so. A violation of the Act is complete when one attempts or conspires to induce a victim engaged in interstate commerce to part with property. United States v. Glynn , 627 F.2d 39 (7th Cir. 1980).

The fact that the offense alleged in Count Four of the instant indictment is an anticipatory crime--attempt and/or conspiracy--does nothing to alter the requirement that the interstate nexus must be established. In discussing the jurisdictional nexus for inchoate crimes under the Act, the Second Circuit in United States v. Varlach, 225 F.2d 665, 671 (1955) stated:

> An examination of the various forms taken by the legislation since the passage of the Anti- Racketeering Act of 1934 makes in clear beyond cavil, that the Congress sought to apply criminal sanctions to acts constituting extortion or robbery or attempts or conspiracies to commit such acts providing only, as indeed the constitutional prerequisites to legislative jurisdiction require, that the conduct obstructed, delayed, affected, or in some way related to interstate

commerce."

D. Intent Requirements under the Act

The necessity for the interstate commerce nexus where an attempt or conspiracy is charged under the Act can be discerned by reviewing the intent requirements necessary for conviction.

The Hobbs Act is clearly a statute requiring on general intent; it contains no language requiring "willful" or "knowing" conduct.

Furthermore, the legislative history of the Act indicates that, during passage of the present law, an amendment had been proposed as an alternative to the present language which did contain the "knowingly" and "willfully" language, but was rejected by Congress. See 91 "Congressional Record", pp. 11918-19 (1943).

The Congress was aware of the alternate language requiring specific intent but nevertheless did not include it in the present Act. Court have consistently held the Act to require only a general intent to create a violation. United States v. Bryson, 418 F. Supp. 818 (W.D. Okla. 1975).

A defendant need not intend to contemplate an effect on commerce. United States v. Nakaladski, 481 F.2d 289 (7th Cir. 1968). The prosecution need only show that he agreed to embark upon a course of extortionate behavior likely to have the natural effect of obstructing commerce. United States v. Cupton, 495 F.2d 550 (5th Cir. 1974).

Congressional insistence upon a general intent statute was intended to maximize constitutional power to punish actual interference with interstate commerce by extortion. Stirone v. United States, supra. The intent of the defendant becomes secondary to the desire of Congress to curb adverse effect of commerce. It is the defendant's effect on commerce, rather than his state of mind which drew greater congressional scrutiny.

If the interstate commerce nexus must be satisfied to sustain a conviction for a substantive offense, no different jurisdictional element should exist where an attempt or conspiracy is alleged.

In United States v. Feola, 420 U.S. 671 (1975), the Supreme Court held that where a substantive statute has as an element of proof some federal jurisdictional factor, such as the interstate commerce nexus in the Hobbs Act, unless the substantive statute requires that a defendant be aware of this factor, the conspiracy charge will not require it.

It is undisputed that conviction for a completed extortionate act under the Hobbs Act requires proof of some actual or potential effect on commerce. United States v. Staszuk, supra. at 53. The government need not show that the defendant formed the specific intent to obstruct commerce; it need show he committed an act whose necessary and natural consequence is to affect commerce. United States v. Pranno, 385 F.2d 387, 389 (7th Cir. 1967).

The government conceded that the Forex Company had no actual effect on commerce. It seems clear that under the facts in the instant case, it could not have any potential effect on commerce either. Such an effect would be necessary before a completed extortionate act could be punishable under the Hobbs Act.

Accordingly, mere belief by a defendant that Forex was engaged in interstate commerce is insufficient to satisfy the jurisdictional nexus under the Hobbs Act. Where that belief would be insufficent to sustain a conviction for a substantive offense, it should similarly be insufficient to support a conviction for conspiracy or attempt.

An analysis of Judge Pregerson's opinion in United States V. Brooklier, supra., reveals that he has misconstrued the

intent of the Hobbs Act. in finding that no effect on interstate commerce need be shown where an anticipatory violation of the Act is alleged.

Judge Pregerson cited the Supreme Court opinion in United States v. Perez, 402 U.S. 146 (1971), a case arising under the Consumer Credit Protection Act [18 U.S.C. 891] for the proposition that Congress could punish extortionate activity under the Hobbs Act without a specific showing in every case that the proscribed activity affects commerce.

Perez, supra, relied on a "class of activities" concept and concluded that Congress could properly legislate against loan sharking on a nationwide scale without having to inquire whether each instance of loan sharking affected interstate commerce. Brooklier, supra at 482. Judge Pregerson concluded that Congress intended a similar approach where inchoate crimes are charged under the Hobbs Act.

Such a "class of activities" approach to Hobbs Act violations has been rejected by the Seventh Circuit in United States v. Staszcuk, supra. In an en banc opinion written by Judge Stevens, (now Mr. Justice Stevens), the Court concluded:

> The language of the statute [Hobbs Act] does not permit us to treat it as a determination that since the class of activities giving rise to federal concern has an adverse effect on commerce, Congress intended any activity within the class to be subject to prosecution without necessity of any showing of an actual or potential effect on commerce in the particular case. Id at 59, n. 16.

This analysis squarely rejects the conclusions upon which this case was originally decided, and which the Ninth Circuit has accepted. An ascertainableinterstate nexus is a necessary prerequisite to a prosecution under the Hobbs Act, whether the

offense charged is a completed or inchoate offense. It is submitted that the Ninth Circuit in United States v. Bagnariol, supra, and the instant case, has incorrectly interpreted the Hobbs Act and wrongly affirmed the conviction herein.

II. May a "Manufactured" Federal Nexus Satisfy the Interstate Commerce Requirement?

On September 2, 1976, agents of the F.B.I., posing as the operators of Forex, the undercover F.B.I. operation, traveled to Las Vegas and arranged to meet unindicted coconspirator Thomas Ricciardi at the MGM Grand Hotel.

Ricciardi traveled from Los Angeles to Las Vegas and met with the agents in a hotel room for the purpose of picking up a payment of $1,000 which was the product of the defendants' extortionate conduct.

Special Agent Larson, one of the F.B.I. agents masquerading as an employee of Forex, told Ricciardi in a recorded conversation that he and Special Agent Fishbeck had to go to Las Vegas in an effort to get financing for a video cassette machine. Transcript, Volume XVI, pp. 4376-77.

That meeting was charged as an act of racketeering in both Counts One and Two; it was alleged as both an attempt and conspiracy to commit extortion under the Act. Ricciardi's conversation with agents Larson and Fishbeck in the Las Vegas hotel room was played for the jury during the trial.

In reality, of course, there was no video cassette machine; no business deal which required the trip to Las Vegas. Forex was never in business.

Clearly, the trip to Las Vegas was merely an attempt to induce one of the defendant's to cross a state line so as to provide the necessary interstate commerce nexus.

Such an attempt to manufacture federal jurisdiction has been condemned by the Second Circuit in United States v. Archer (2nd Cir. 1978) 486 F.2d 670.

Nothing in the record supports the bald statement in the opinion that the activities engaged in by the parties were of an interstate character. Aside from the statements of the agents that they were involved in an international pornography operation, nothing would suffice to provide the necessary interstate or international nexus.

The factual setting in the instant case is remarkably similar to that condemned in Archer, supra. There, as in the case at bar, a blatant attempt was made to provide an interstate nexus where none existed. This honorable court should reaffirm the holding in Archer by condemning the activities engaged in here.

CONCLUSION

The case, although essentially a single-issue question, would result in the vacating of all three counts of which petitioner was convicted. His conviction on Counts One and Two--the RICO counts--depend on a finding that the predicate acts of racketeering--The Hobbs extortions--were properly brought. If the Court were to find that Count IV--the substantive Hobbs Act--was not properly brought because of the absence of the necessary interstate nexus, Counts One and Two would also have to be vacated due to an absence of the required two acts of racketeering. Convictions were rendered on those two counts only because the court below found that the Hobbs Act alleged in Count IV could be alleged as several separate acts of racketeering in Counts One and Two.

For the foregoing reasons, this Honorable Court should grant petitioner's request and issue an order reviewing the convictions below for the reasons asserted herein.

DATED: December 29, 1982

Respectfully Submitted,

Howard W. Gillingham, Lawyer
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